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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>WILLIAM EDMUND LUCERO,<br>Defendant and Appellant. | E033953<br>(Super.Ct.No. FSB 30041)<br>OPINION |

APPEAL from the Superior Court of San Bernardino County. John N. Martin, Judge. Affirmed.

Kimberly J. Grove, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez, Supervising Deputy Attorney General, and Andrew S. Mestman, Deputy Attorney General, for Plaintiff and Respondent.

## 1. Introduction

Defendant William Edmund Lucero, Jr. appeals from a judgment convicting him of murder, attempted murder, assault with a deadly weapon, and false imprisonment. On appeal, defendant raises the following claims: insufficient evidence supported that he acted with premeditation and deliberation; the court erred in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter; the court erred in instructing the jury on implied malice and motive; and the court erred in imposing multiple sentences for the assault and false imprisonment offenses.

For the reasons provided below, we conclude that sufficient evidence supported defendant's convictions, no prejudicial error resulted from the court's instructions, and defendant's sentence was commensurate with his culpability. We affirm the judgment.

## 2. Factual and Procedural History

On February 27, 2001, Alejandro Garcia (Alejandro) was drinking beers at his house with his brother Ascencion Garcia (Ascencion) and his brother-in-law Miguel Chavarria. At 5:00 p.m., the three men went to pick up Enrique Garcia, another brother-in-law, who was living with his girlfriend, Lorena Sanchez, at defendant's grandmother's house. The four men went to a nearby bar. Afterwards, at 11:30 p.m., they drove back to defendant's grandmother's house to drop off Enrique.

While the others waited in the truck, Enrique got out and knocked at the door. Sanchez, Enrique's girlfriend, came out the front door and demanded that Enrique and his brothers leave. The four men were listening to loud music in their truck. Defendant's grandmother was asleep in the house and defendant had told Sanchez to make them

leave. Defendant warned Sanchez that if she could not, "[h]e was gonna make them leave." After confronting Enrique, Sanchez was yelling at him and hitting him.

After about a minute and a half, Alejandro and Ascencion got out of the truck and walked toward the front door to calm down Enrique and Sanchez. As they approached the house, defendant grabbed his gun, came out of the house and began shooting at them. Defendant first shot Ascension in his left chest. He then shot Alejandro four times in the arm, stomach, and hip.

Enrique ran and hid in some nearby bushes. Enrique thought that defendant also was shooting at him.

After shooting Alejandro and Ascencion, defendant walked toward Chavarria, who was sitting in the front passenger seat of the truck. Defendant opened the door, grabbed Chavarria by the arm, and pulled him down to the ground. After falling on his knees, Chavarria quickly returned to his feet. When defendant asked him what the problem was, Chavarria responded, "There's no problem." Throughout the encounter, defendant had his gun pointed at Chavarria. Defendant told Chavarria to leave. Chavarria entered the truck through the passenger side door, moved to the driver's side, and tried to start the truck. Meanwhile, defendant walked to the driver's side door and held his gun to Chavarria's head, making contact with Chavarria's left ear. Seconds later, Chavarria started the truck and drove away.

Defendant returned to the house, gathered some belongings and departed with his girlfriend, Dawn Peck. Before he left, he told his cousin Darlene Olguin to move the bodies.

Later that night at a friend's house, defendant showed the friend the gun and explained that he had to shoot the men. Defendant said that one of the men tried to grab something out of his pocket. Defendant had four or five empty shell casings, which he gave his girlfriend to hold temporarily.

Ascension died at the scene and Alejandro was later transported to the hospital, where he remained for over a month recovering from his wounds.

On July 18, 2001, the San Bernardino County District Attorney filed an information charging defendant with the premeditated murder of Ascencion (count 1) (Pen. Code § 187, subd. (a))[1], the attempted murder of Alejandro and Enrique (counts 2 and 3) (§§ 664 & 187, subd. (a)), assault with a deadly weapon upon Chavarria (count 4) (§ 245, subd. (a)(2)), and false imprisonment by violence (count 5) (§ 236). The district attorney also charged defendant with the following enhancements: great bodily injury or death (§ 12022.53, subd. (d)) in counts 1 and 2; personal discharge of a firearm (§ 12022.53, subd. (c)) in counts 1, 2, and 3; personal use of a firearm (§ 12022.53, subd. (b)) in counts 1, 2, and 3; and personal use of a firearm (§ 12022.5, subd. (a)(1)) in all five counts.

The jury found defendant guilty in counts 1, 2, 4, and 5, but not guilty in count 3. As to counts 1, 2, 4, and 5, the jury found all the enhancements true. The court later sentenced defendant to a total prison sentence of 89 years eight months to life.

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[1] All further statutory references will be to the Penal Code unless otherwise stated.

3. Sufficient Evidence of Premeditation and Deliberation

In both counts 1 and 2, defendant claims that insufficient evidence supported the jury's finding that he acted with premeditation and deliberation.

In evaluating a claim of insufficient evidence, this court determines whether the entire record reviewed in the light most favorable to the judgment reveals substantial evidence—i.e., evidence that is reasonable, credible, and of solid value—that would lead a reasonable jury to find the defendant guilty beyond a reasonable doubt. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) In making this determination, we give deference to the jury's factual findings and we assume the existence of every fact the jury reasonably could have deduced from the evidence that was necessary for the verdict. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The jury returned guilty verdicts on the murder and attempted murder charges. Premeditated and deliberate murder is a killing that results from a deliberate decision or preconceived plan to kill, after a careful thought and weighing process, which is carried out in a cool and steady manner. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Martinez* (1987) 193 Cal.App.3d 364, 369.) Premeditation and deliberation can be shown by evidence of planning, motive, and the manner of the killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) Rather than a set of rigid criteria, these categories provide a useful framework for analysis for resolving the ultimate question of whether the evidence supports an inference that the killing resulted from a preconceived plan. (*Koontz, supra*, 27 Cal.4th at p. 1081, quoting *People v. Thomas* (1992) 2 Cal.4th 489, 517.)

In this case, the evidence supported the jury's finding that defendant acted out of a preconceived plan, instead of a rash impulse. Planning refers to the "facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing . . . ." (*Anderson, supra*, 70 Cal.2d at pp. 26-27.) The evidence shows that defendant had planned to confront the men in the truck with the gun in his hand. As the truck pulled up to the house, defendant was annoyed by the loud music. Concerned for his sick grandmother who was asleep in one of the rooms, defendant told Sanchez, "get her ass out there and make them leave." Defendant also told Sanchez that, if she was unsuccessful, "[h]e was gonna make them leave." Sanchez only added to the noise as she walked to the front door and yelled at Enrique. Defendant then retrieved his gun from under a mattress and walked outside. The fact that defendant armed himself with a loaded gun and then used it on two unarmed men was strong evidence of planning. (See *People v. Adcox* (1988) 47 Cal.3d 207, 240.)

There also was evidence of motive. Defendant believed that the men were "disrespecting" his home and his family. They drove to the house late at night, playing loud music. After Enrique approached the house, a verbal and physical fight erupted between him and Sanchez, defendant's cousin. As defendant had warned Sanchez, he was going to take matters into his own hands.

The manner of killing also supports the jury's finding that defendant acted with premeditation and deliberation. Contrary to defendant's self-serving testimony, the other witnesses testified that defendant gave no warning before he fired his weapon. He simply

walked outside and immediately began firing. Both Ascencion and Alejandro were unarmed. No words were exchanged before the shooting. This evidence shows that the two brothers did nothing to provoke a violent response. Defendant simply followed through on his plan to force the unwanted guests to leave.

We conclude that the record reveals substantial evidence that defendant acted with premeditation and deliberation when he killed Ascencion and attempted to kill Alejandro.

4. Instructions

Defendant claims the trial court erred in instructing the jury on the elements of implied malice and motive and failing to instruct on the lesser included offense of attempted voluntary manslaughter.

A trial court has a sua sponte duty to instruct on all general principles of law that are closely and openly connected with the facts in the case. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) In addition to having a duty to instruct on all relevant principles of law, the court has a correlative duty to refrain from instructing on principles of law that either have no relevance to the issues raised by the evidence or may confuse the jury in its deliberation of the relevant issues in the case. (See *People v. Armstead* (2002) 102 Cal.App.4th 784, 792.)

The court's duty to instruct on general principles includes the duty to instruct on defenses and lesser included offenses. (*People v. Maury* (2003) 30 Cal.4th 342, 424; *People v. Breverman* (1998) 19 Cal.4th 142, 162) "A trial court's duty to instruct, sua sponte, on particular defenses arises '"only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense . . . and the

defense is not inconsistent with the defendant's theory of the case."' [Citation.]" (*Maury, supra*, at p. 424.) Similarly, the court's duty to instruct on lesser included offenses arises when there is evidence substantial enough to merit consideration by the jury. (*Breverman, supra*, 19 Cal.4th at p. 162.)

In determining whether the court made an instructional error, we review the entire charge to the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.) When the given instruction is ambiguous, we determine whether there is a reasonable likelihood that the jury misapplied the instruction in the manner suggested by the defendant. (*Id*. at p. 963.)

A. Implied Malice

Defendant claims the trial court erred by failing to admonish the jury that the implied malice instruction did not apply to the attempted murder offense. Certain instructions, including CALJIC No. 8.11 on implied malice and CALJIC No. 8.31 on second degree murder, applied only to the murder offense charged in count 1. The court, however, failed to inform the jury that a finding of implied malice was inadequate to support a conviction for the attempted murder offense charged in count 1.

Both CALJIC Nos. 8.11 and 8.31 set forth the elements of implied malice. As noted in the comment for CALJIC No. 8.11, when the defendant is charged with attempted murder, which requires express malice, the court should not make any reference to implied malice. (Comment to CALJIC No. 8.11 (6th ed. 1996) at page 384, citing *People v. Santascoy* (1984) 153 Cal.App.3d 909, 918; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 391.) In a case involving both murder and attempted murder, the

court should have admonished the jury to disregard the implied malice instructions when deliberating on the attempted murder offense.

However, in light of the court's instructions as a whole, it is unlikely that the jury was confused by the implied malice instructions. (*Carpenter, supra*, 15 Cal.4th at p. 391; *Smithey, supra*, 20 Cal.4th at pp. 963-954.) The court fully instructed the jury on the elements of an attempted murder. (Compare *Carpenter, supra,* 15 Cal.4th at page 391 with *People v. Ratliff* (1986) 41 Cal.3d 675, 695.) The court specifically informed the jury that they must find that, "[t]he person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being." As to the attempted murder charge, the implied malice instructions were superfluous and the court advised the jury to disregard any unnecessary instructions.

Consistent with the court's instructions, the prosecutor repeated the elements for the crime of attempted murder. In reference to the crime charged in count 2, the prosecutor stated that, "the person committing the act harbored express malice aforethought, namely a specific intent to unlawfully kill another human being."

Moreover, in count 2, the jury found the defendant guilty of willful, premeditated, deliberate attempted murder. "Because a willful murder is intentional, and malice is express when there is an intent to unlawfully kill a human being, the verdict in [count 2] necessarily rested on a jury finding that appellant acted with express malice. '. . . [O]nce a defendant intends to kill, any malice he may harbor is necessary express malice.' [Citation.]" (*People v. Young* (1987) 189 Cal.App.3d 891, 910.)

Under these circumstances, it is unlikely that the jury ignored the specific instruction regarding the requirement of express malice in reaching a verdict in count 2. (See *People v. Coleman* (1989) 48 Cal.3d 112, 142.) We conclude that no prejudicial error resulted from the court's instructions on implied malice.

B. Attempted Voluntary Manslaughter

Defendant claims the trial court erred in failing to provide instructions on the lesser included offense of attempted voluntary manslaughter.

As stated above, the court has a sua sponte duty to instruct on a lesser included offense when the parties have presented substantial evidence, i.e., evidence from which a jury reasonably could find the defendant guilty of the lesser offense instead of the greater offense. (*Breverman, supra*, 19 Cal.4th at p. 162.) However, "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*Koontz, supra*, 27 Cal.4th at pp. 1085-1086.)

In this case, the facts show that defendant stepped outside and fired his weapon, killing Ascencion and wounding Alejandro. Because the murder and attempted murder offenses arose out of a single, indivisible transaction, defendant's mental state during the commission of both offenses was indistinguishable. (See *Young, supra*, 189 Cal.App.3d at p. 910.) In count 1, based on the jury's finding that defendant committed willful, premeditated, and deliberate murder, the jury necessarily found that defendant acted with express malice. (See *Young, supra,* 189 Cal.App.3d at p. 910.) The jury's finding of express malice is inconsistent with the theory that defendant acted in a heat of passion or

unreasonable self-defense. (See *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708.) Manslaughter is defined as an unlawful killing without malice. (§ 192; see also *Koontz, supra*, 27 Cal.4th at p. 1086.) Although the court instructed the jury on voluntary manslaughter as a lesser included offense to the crime charged in count 1, the jury found the defendant guilty of the greater offense. While the court failed to provide instructions on attempted voluntary manslaughter as a lesser included offense to the crime charged in count 2, because defendant's mental state during the commission of both offenses was indistinguishable, the omitted instruction likely had no effect on the jury's ultimate verdict in count 2.

Moreover, in count 2, the jury also found defendant guilty of willful, premeditated and deliberate attempted murder. As stated above, failure to instruct on a lesser offense is harmless if the jury necessarily decides the factual questions adversely to defendant based on other properly given instructions. (See *Koontz, supra*, 27 Cal.4th at pp. 1085-1086.) Because the evidence supported the greater offense, the court's failure to instruct on the lesser offense would not have affected the outcome of the case. (See *Breverman, supra*, 19 Cal.4th at p. 165.)

We conclude that no prejudicial error resulted from the court's failure to instruct on the lesser included offense of attempted voluntary manslaughter.

C. Motive

Defendant claims that, while CALJIC No. 2.51 is generally a correct statement of law on the element of motive, the instruction was inapplicable, misleading, and confusing based on the evidence presented in this case. Defendant specifically claims that, because

the evidence of motive was evidence presented primarily by the defendant to show that he acted in self-defense or heat of passion, the instruction inappropriately advised the jury to consider this evidence in establishing his guilt.

The trial court instructed the jury as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty."

Based on the language of the instruction, there is no reasonable likelihood that the jury was misled as defendant suggests. "Motive describes the reason a person chooses to commit a crime." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) Motive is not synonymous with intent. (*Ibid*.; see also *People v. Cash* (2002) 28 Cal.4th 703, 739.) While intent to commit the act may be undisputed where defendant relies on a theory of self-defense, evidence of motive continues to be relevant. (See *People v. Lynn* (1984) 159 Cal.App.3d 715, 728.) Evidence of motive may show that defendant's act was the result of premeditation, as opposed to an act of self-defense. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1081; *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375.) Thus, contrary to defendant's argument, the existence of motive would have had some tendency in reason to rebut the defense theories. The court therefore correctly instructed the jury that the presence of motive may tend to establish guilt and the absence of motive may tend to show innocence.

Furthermore, the instruction does not preclude the jury from finding that, despite the presence of motive, defendant acted in self-defense or the heat of passion. The

instruction simply allows the jury to consider motive even though motive is not an element of the crime. (*People v. Cleveland* (2004) 32 Cal.4th 704, 750.) It does not require that the jury reach any particular result. (*People v. Prieto* (2003) 30 Cal.4th 226, 254.) Although the court could have clarified that the presence of motive, in this case, also may have established that defendant was guilty of a lesser included offense, defendant failed to request such clarification. (*Cleveland, supra*, 32 Cal.4th at p. 750.) Even as given, the instruction would not have misled the jury into reaching a particular verdict simply based on the evidence of motive.

Besides, any error would have been harmless in light of the instructions given by the court and the argument presented by counsel. (See *People v. Petznick* (2003) 114 Cal.App.4th 663, 685.) In addition to providing instructions on the required elements of each offense, the court also provided a full panoply of instructions on the defense theories, including the heat of passion and reasonable and unreasonable self-defense (CALJIC Nos. 8.42, 8.43, 8.44, 8.50, 5.12, 5.13, 5.14, 5.15, 5.16, 5.17, & 5.50). In discussing the motive for defendant's actions, both the prosecutor and defendant's trial attorney mentioned the victims' loud and unwanted intrusion upon defendant's household. On the one hand, the prosecutor argued that such motive was inadequate to justify defendant's violent response. On the other hand, defendant's trial attorney argued that the intrusion, along with other evidence of the victims' belligerent conduct, provoked defendant to resort to deadly force. In finding defendant guilty of premeditated murder and attempted murder, the jury rejected defendant's account of the incident based on the facts presented by the parties.

There was no reasonable likelihood that the jury misconstrued the instruction as prohibiting a finding of innocence as to charged offense, or guilt as to a lesser offense, based on the motive instruction.

5. Multiple Punishment

Defendant claims the trial court erred in imposing consecutive sentences for the two crimes arising from the attack upon Chavarria. The court sentenced defendant to a total term of 14 years for the assault with a deadly weapon and the firearm enhancement in count 4 and a consecutive term of eight months for the false imprisonment offense charged in count 5. Defendant argues that because both crimes were based on the same act or an indivisible course of conduct, section 654 precludes the imposition of consecutive sentences.

Subdivision (a) of section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Section 654 applies not only to the same criminal act, but also to an indivisible course of conduct committed pursuant to the same criminal intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, citing *Neal v. State of California* (1960) 55 Cal.2d 11; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.) """Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the

offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."' [Citation.]" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1084.) The court's factual determinations regarding defendant's intent and objective must be upheld if supported by substantial evidence. (*Id*. at p. 1085.)

During the sentencing hearing, the trial court imposed separate sentences for the crimes charged in counts 4 and 5. Defendant did not assert an objection and the court did not make any factual findings under section 654. Nevertheless, implicit in the court's pronouncement of judgment was the finding that the two crimes constituted separate acts or involved separate objectives. (See *People v. Jones* (2002) 103 Cal.App.4th 1139, 1147.)

Substantial evidence supports the court's implied finding. Chavarria testified that, after Ascencion and Alejandro fell to the ground, defendant approached Chavarria, who was sitting in the front passenger seat of the truck. Defendant opened the passenger door, grabbed Chavarria by the arm, and pulled him to the ground. Chavarria fell to his knees. Throughout this initial confrontation, defendant had his gun pointed at Chavarria's upper body. The evidence of defendant forcing Chavarria to the ground at gunpoint supported the false imprisonment charge. A person commits felony false imprisonment by exercising force greater than is necessary to restrain the person to compel him to remain where he does not wish to remain or go where he does not wish to go. (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 718.)

Chavarria explained that, after this initial confrontation, he stood up and returned to the truck. As Chavarria moved to the driver's seat, defendant walked around the truck

and held the gun to Chavarria's head. After five to ten seconds, Chavarria was able to start the engine and drive away. The court reasonably could have found that the second confrontation at the driver's side door involved a separate and distinct act by defendant to harass or frighten Chavarria as he attempted to leave the area. Defendant already had achieved his purpose of forcing Chavarria to leave. Defendant's further act of walking to the driver's side door and pointing his gun at Chavarria's head, therefore, accomplished no other purpose than to frighten Chavarria and speed his departure.

The additional act of walking to the driver's side door also indicated that defendant had an opportunity to reflect between offenses. Separate sentences are justified when the evidence indicates that the defendant had an opportunity to reflect between the offenses and that each successive offense involved a new risk of harm. (See *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255.) Here, this additional confrontation with the gun subjected Chavarria to a new risk of harm. The act of pointing his gun at Chavarria's head constituted a separate act of gratuitous violence. (See *People v. Watts* (1999) 76 Cal.App.4th 1250, 1265; *People v. Saffle* (1992) 4 Cal.App.4th 434, 439-440.) Defendant not only pointed to Chavarria's upper body, defendant held the gun directly behind Chavarria's left ear. By subjecting Chavarria to this additional risk of harm, defendant's conduct demonstrated greater culpability, thereby justifying a separate sentence.

We conclude that substantial evidence supported the court's imposition of separate sentences for the crimes charged in counts 4 and 5.

## 6. Disposition

We affirm defendant's convictions.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.